Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

October Term, 1999

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INSURANCE CONSULTANTS OF KNOX, INC.,
and MARVIN D. MILLER,

*Petitioners*,

vs.

UNITED STATES OF AMERICA,

*Respondent*.

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On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

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## PETITION FOR WRIT OF CERTIORARI

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54 pp

## QUESTIONS PRESENTED

I. Whether an IRS summons that gives less than ten days notice is enforceable considering the statutory prerequisite that notice "shall not be less than 10 days."

II. Whether a corporate officer can be compelled to give oral testimony pursuant to a summons when any question authorized by the summons requires an incriminating response.

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## OPINIONS BELOW

The opinion of the court of appeals issued in support of its judgment is reported as *United States v. Insurance Consultants of Knox, Incorporated, and Marvin D. Miller*, 1999 U.S. App. LEXIS 19662, 99-2 U.S. Tax Cas. (CCH) ¶ 50,791 (August 18, 1999), and is reprinted in Appendix A.

The opinion of the district court is reported as *United States v. Insurance Consultants of Knox, Inc., et al.*, 1998 U.S. Dist. LEXIS 17867 (October 8, 1998), and is reprinted in Appendix B.

The report and recommendation of the magistrate is reported as *United States v. Insurance Consultants of Knox, Inc., et al.*, 1998 U.S. Dist. LEXIS 15357, 82 A.F.T.R.2d (RIA) 6495 (September 14, 1998), and is reprinted in Appendix C.

## JURISDICTION

The opinion of the court of appeals in this case was filed on August 18, 1999. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if mailed U.S.P.S. first class, postmarked by November 16, 1999.

This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the following constitutional and statutory provisions.

No person shall . . . be compelled in any criminal case to be a witness against himself.

U.S. CONST. Amend. V

The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 shall be such time and place as may be fixed by the Secretary and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421(g)(2), or 6427(j)(2), the date fixed for appearance before the Secretary shall not be less than 10 days from the date of the summons.

26 U.S.C. § 7605(a)

## STATEMENT OF THE CASE

This case concerns two IRS summonses issued in the course of a criminal investigation of Petitioner Marvin D. Miller's ("Miller"). The first summons was issued in the name of and served on Petitioner Insurance Consultants of Knox, Inc. ("ICKI") by in-hand service to Miller as ICKI's representative. After ICKI did not voluntarily appear, a second summons requesting the same documents and testimony was issued in the name of and served on Miller as Secretary/Treasurer of ICKI.

After Miller did not voluntarily appear, the IRS petitioned the district court for enforcement of both summons. The district court ordered both ICKI and Miller to show cause why the summons should not be enforced. The magistrate held an evidentiary hearing at which ICKI appeared by counsel and Miller appeared pro se.

ICKI and Miller argued, *inter alia*, that (1) the first summons was unenforceable because it failed to comply with the jurisdictional requirement that notice "shall not be less than ten days"; and (2) Miller could not be compelled to give oral testimony because all testimony responsive to the summons would be incriminating. The district court adopted the magistrate's findings that (1) notice was sufficient; and (2) Miller could be compelled to testify because the summons directed him to, and the statute authorizing summonses provides that a person may be summoned to, give testimony.

The Court of Appeals affirmed by (1) holding notice less than ten full days was sufficient because (a) the statute didn't say "ten **full** days," and (b) no prejudice was shown; and (2) mischaracterizing Miller's Fifth Amendment argument as relating to the production of documents and applying the collective entity rule to its mischaracterization.

This timely petition follows.

## REASON FOR GRANTING THE WRIT

I. The Court Of Appeals Erred Holding That Notice Less Than The Time Period Required Was Sufficient Per Se, Or In The Absence Of Prejudice.

26 U.S.C. § 7605(a) requires that, in relation to the instant summonses, "the date fixed for appearance before the Secretary shall not be less than 10 days from the date of the summons." The first summons was served on February 11, 1997. It required appearance at "11:00 o'clock a.m." on February 21, 1997. It was not disputed that the notice given was less than literally required by the statute.

Petitioners argued below that (1) the notice was deficient under the statute; (2) as a question of first impression, the IRS's interpretation should be given weight; and (3) the notice is jurisdictional, thus requiring strict compliance. The court of appeals held the notice sufficient, ruling:

> Had the statute explicitly provided for a notice period of 240 hours or ten full days, we might decide otherwise, but the term "days" in the notice period will bear the interpretation "during business hours." Unless the taxpayer can show that he is prejudiced by notice of less than ten full days because the deficit disabled him from disputing the summons or producing the requested information, notice to appear any time during the business hours of the tenth day constitutes sufficient notice for the purposes of § 7605(a).

The Court of Appeals' first impression decision on this important federal question is a classic example of judicial legislation prohibited by prior decisions of this Court.

A. Literal interpretation required.

The Court of Appeals creates a false issue by distinguishing "not less than 10 days" from "not less than 240 hours" and "not less than ten full days." Ten days means ten days. Congress is not required to convert ten days into hours or add superfluous modifiers to reinforce what it has already said. The statute is not ambiguous. The IRS simply failed to comply with it.

Even is it were ambiguous, "a dominant, well-settled principle of federal law" prohibits the Court of Appeals'

decision. *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 415-17 (1992) (When an agency has interpreted a statute it administers, if the agency's construction of an ambiguous provision is a permissible construction, federal courts must follow it). *See also Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (same).

The applicable regulation required ten days notice in the exact language of the statute. 26 C.F.R. § 301.7605-1(b)(2). To ensure compliance with the ten day notice provision, IRS manuals require eleven days notice. For example, IR Manual HB 57(16)0 (7/17/89), provides as follows:

> IRC 7605(a) specifically provides that the time and place of an examination pursuant to the provisions of 7602 may be fixed by the Secretary or his delegate with the only restrictions being that: the time and place be "reasonable under the circumstances"; and when the appearance is pursuant to a summons, the date fixed should not be less than ten days from the date of the summons. To ensure compliance with this statutory requirement, IRM 52(12)4.5 provides that the appearance date must not be less than 11 full days from the date the summons is served. In computing the 11-day period, the date of service should be excluded and the date of appearance should be counted. The return date should not be on a Saturday, Sunday or legal holiday.

Interestingly, the IRS interpretation used the Court of Appeals' preferred word, "full," in its eleven day requirement. The IRS interpretation ensures a literal ten day notice period as argued by Petitioners.

With regard to the IRS's construction of § 7605(a) "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). "The court need not conclude that the agency construction was the only one it permissibly could have adopted . . ., or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843, n.11. A "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the" IRS. *Chevron*, 467 U.S. at 844.

The IRS's literal interpretation is clearly reasonable. Because the Court of Appeals violated this Court's "dominant" and "well settled" principal of statutory construction, a writ of certiorari should issue to address this important question of federal law.

B. Specific compliance required.

Independent of the above argument, strict compliance is required because the notice period goes to subject matter jurisdiction.

In authorizing the United States to seek enforcement of a summons, Congress imposed a requisite condition for the commencement of this action -- a summoned party must "refuse to obey the Summons." 26 U.S.C. § 7604(b). Because refusal to obey the summons is a prerequisite to the commencement of the enforcement action, this element is jurisdictional. The refusal to obey the summons must be fully alleged in the pleadings in order for federal courts to acquire subject matter jurisdiction. As the undisputed facts disclose, Petitioners could

not have refused to obey the summons, because the summons was invalid, due to United States failure to strictly comply with the ten day notice requirement. It is elemental that an individual cannot refuse to obey a document that is invalid on its face. Before an omission becomes an act, there must be a legal duty.

A district court has generally such subject matter jurisdiction as the Congress shall establish and upon the conditions as the Congress may impose. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co.*, 511 US 375, 377 (1994) (internal citations omitted). The statutorily imposed limits upon federal jurisdiction are to be neither disregarded or evaded. *Owen Equipment & Erection Co. v. Kroger*, 437 US 365, 374 (1978) When the inquiry involves jurisdiction of the district court, the presumption at every stage of a cause is that the court is without jurisdiction unless the contrary appears in the pleadings and from the record and the burden of establishing the existence of jurisdiction rests with the party asserting the existence of jurisdiction. *Kokkonen*, 511 U.S. at 377; *Miller & Lux Inc. v. East Side Canal & Irrigation Co.*, 211 US 293, 302 (1908); *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573 (Fed. Cir. 1993); *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993).

Since the summons is invalid on its face, the district court was without subject matter jurisdiction to enforce it. Because the courts below improperly extended their jurisdiction, a writ of certiorari should issue to address this important question of federal law.

II. The Court Of Appeals Erred Enforcing Summonses Compelling Oral Testimony Because Any Question Authorized By The Summonses Requires An Incriminating Response.

Both summonses require Miller "to give testimony . . . relating to the tax liability . . . or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning" himself.[1] The original petition disclosed that the IRS sought to use the summonses to, *inter alia*, "ascertain whether Mr. Miller has committed any offense connected with the administration or enforcement of the internal revenue laws." The original petition sought an order compelling Miller to testify "as required by the summonses."

Petitioner's argued below that even though a custodian may be required under the collective entity rule to produce documents, Miller cannot be compelled to give incriminating oral testimony. Because all questions justified by the summonses require an incriminating answer, the federal courts cannot require compliance with it. Petitioner's requested the Court of Appeals to reverse "to the extent [the summonses require] Miller to give oral testimony."

The Court of Appeals mischaracterized Petitioners' argument and ruled as follows:

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1. While technically Summons I requires a corporate officer or custodian of records of ICKI to testify, because he is the only person who has sufficient access to and knowledge of the records to comply with the summons, it actually requires Miller's testimony.

> Miller claims the prohibition against compelled oral testimony which might incriminate him means that his personal Fifth Amendment privilege extends to the production of corporate documents of which he is custodian and which might incriminate him.... Should he be asked to give oral testimony which might incriminate him, we would face different questions which are not presented here.

The Court of Appeal's failure to address the issue raised resulted in a judgment contrary to the United States Constitution and the decisions of this Court.

A. Collective entity rule is inapplicable to the issue presented.

The law is clear that Miller cannot rely on a personal privilege against self-incrimination to avoid producing records of ICKI that are in his possession in a representative capacity, even if those records might incriminate him personally. *Braswell v. United States*, 487 U.S. 99, 114 & 117 (1988). This premise is called the "collective entity rule." *Braswell*, 487 U.S. at 104. But as *Braswell* makes clear, the collective entity rule does not apply to oral testimony.

As this Court has consistently ruled:

> The Curcio Court made clear that with respect to a custodian of a collective entity's records, the line drawn was between oral testimony and other forms of incrimination. "A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But **he cannot**

> **lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony**." 354 U.S., at 123-124. n6
>
> > n6 See also 354 U.S., at 124-125 ("There is no hint in [the collective entity] decisions that a custodian of corporate or association books waives his constitutional privilege as to oral testimony by assuming the duties of his office. By accepting custodianship of records **he 'has voluntarily assumed a duty which overrides his claim of privilege' only with respect to the production of the records themselves**. *Wilson v. United States*, 221 U.S. 361, 380").

*Braswell*, 487 U.S. at 114.

In *Curcio v. United States*, 354 U.S. 118 (1957), the Court reviewed a judgment holding a custodian in contempt for failing to give oral testimony regarding the location and possession of books and records he had been ordered to produce. The Court rejected the United States' argument that the custodian could not claim a personal privilege when questioned as to the whereabouts of the documents he failed to produce stating:

> [F]orcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment.

*Curcio*, 354 U.S. at 128.

The only oral testimony which might be compelled from Miller despite a claim of personal privilege is not a consideration in this case: to wit, testimony identifying or authenticating the produced documents. *Braswell*, 487 U.S. at 114. Such testimony is given at trial, not in response to a summons.

B. All relevant questions seek incriminating answers.

Miller can not be compelled to answer any question that the IRS may ask unless it was perfectly clear, from a careful consideration of all the circumstances in the case, that the answer[s] cannot possibly tend to incriminate him.

> [T]he great weight of authority in the United States was in favor of the rule that, when a witness on oath declared his belief that his answer would tend to criminate himself, **the court could not compel him to answer, unless it was perfectly clear, from a careful consideration of all the circumstances in the case, that the witness was mistaken, and that the answer could not possibly have such a tendency** . . . .

*Counselman v. Hitchcock*, 142 U.S. 547, 580 (1892).

> It is for the court to say whether his silence is justified, and to require him to answer if "it clearly appears to the court that he is mistaken."

In this setting it was not "**perfectly clear**, from a careful consideration of all the circumstances in the

> case, that the witness was mistaken, and that the answer[s] **cannot possibly** have such tendency" to criminate.

*Hoffman v. United States*, 341 U.S. 479, 486, 488 (1951) (citations omitted, emphasis in original).

Further, courts can make the determination based on the record and is not, per se, required to make any inquiry of Miller.

> In determining whether such a real and appreciable danger of incrimination exists, a trial judge must examine the "implications of the question[s] in the setting in which [they are] asked . . . He "'[m]ust be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" **If the trial judge decides from this examination of the questions, their setting, and the peculiarities of the case, that no threat of self-incrimination exists**, it then becomes incumbent "upon the defendant to show that the answers to [the questions] might criminate him." This does not mean that the defendant must confess the crime he has sought to conceal by asserting the privilege. **The law does not require him "'to prove guilt to avoid admitting it.'"**
> . . .
>
> Thus, the defendant is placed in a delicate position, well described by Judge Learned Hand: "Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a

> paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.

*United States v. Neff*, 615 F.2d 1235, 1239-40 (9th Cir. 1980) (citation omitted).

> Whether there is a sufficient hazard of incrimination is of course a question for the courts asked to enforce the privilege.
>
> In making this determination, a court asks essentially two things. The first is whether the information is incriminating in nature. This may appear in either of two ways. **It may be evident on its face, in light of the question asked and the circumstances of its asking. If it is so facially evident, that ends this inquiry**. If it is not, the person asserting the privilege may yet demonstrate its incriminating potential by further contextual proof.

*United States v. Sharp*, 920 F.2d 1167, 1170 (4th Cir. 1990) (citations omitted).

Clearly then, Miller has no burden to support a claim of privilege unless it is perfectly clear to the examining court that, under the circumstances, the questions could not possibly tend to incriminate him. The courts below had sufficient facts to determine that it would have to affirm Miller's assertion of

privilege as a matter of law.

In *Sharp*, 920 F.2d 1167, the IRS summoned Sharp for his financial records because the IRS had no record of his filing a tax return.[2] Because of Sharp's failure to comply with IRS summonses, or with the court's orders enforcing the summons, the United States sought a criminal contempt order. The district court appointed counsel for Sharp and again ordered him to answer the IRS's questions. In response to questions "designed to elicit information on (1) his income []; (2) bank records or real estate records pertaining to any income or assets []; (3) his employment; and (4) the location of the banks in which he kept income or assets," Sharp's court appointed counsel asserted the privilege against self-incrimination. Addressing the incriminating nature of the questions, the Fourth Circuit stated:

> Here, the incriminating nature of the information sought from Sharp was evident from the very questions asked under the circumstances of their asking. Sharp was asked to provide information directly relating to his income and his knowledge of it for the years in which he was under investigation for failing to file returns. Willfulness is an essential element of the criminal offense of failing to file income tax returns. 26 U.S.C. § 7203. Hence it is evident that the information sought would "furnish a link in the chain of evidence that could lead to prosecution," and that suffices. . . .
>
> With the incriminating nature of the information

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2. Here, IRS Special Agent Arment averred that the summonses seek information to, among other things, ascertain whether Miller has a duty to file federal income tax returns.

> facially evident, the reasonableness of Sharp's apprehension of prosecution **should have been assumed**, unless there were reasons (other than the government's express or implied representation of its present intention) to question the government's legal ability to prosecute.

*Sharp*, 920 F.2d at 1171.

In *United States v. Argomaniz*, 925 F.2d 1349 (11th Cir. 1991), the IRS summoned Argomaniz for his financial records because the IRS had no record of his filing a tax return. After answering biographical questions,[3] Argomaniz asserted his privilege against self-incrimination to questions concerning his tax forms, bank records, employees, income, tax payments, and a request to turn over his records. Without evaluating Argomaniz's assertion of privilege, the district court ordered him to comply with the summons. Curiously, the district court granted a stay pending appeal finding that to do otherwise would "force [Argomaniz] to waive his constitutional right against self-incrimination." Addressing the incriminating nature of the questions, the Eleventh Circuit stated:

> In *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978), the Supreme Court examined the nature of the IRS investigatory system, and, relying in part on the legislative history of the Internal Revenue Code, concluded the system's "criminal and civil elements are

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3. Biographical questions are not at issue in this summons enforcement case because such questions would seek information concerning Miller already in the possession of the IRS; thus both unnecessary and barred by *Powell*.

> inherently intertwined." . . . The IRS summons served on Argomaniz required he produce all documents and records related to income he received during the years 1984 through 1987. If Argomaniz did produce these documents, assuming that he did possess them, then both the civil and criminal aspects of the IRS system would be implicated. . . .
>
> Section 7203 of the Internal Revenue Code makes willful failure to file an income tax return a crime. Accordingly, production of these documents would establish two essential elements of this crime — it would prove that Argomaniz did have taxable income for the years in question, yet failed to file income tax returns. . . . The criminal penalties with which Argomaniz was faced "were scarcely 'remote possibilities out of the ordinary course of law'" and his "hazards of incrimination can only be characterized as 'real and appreciable.'"

*Argomaniz*, 925 F.2d at 1353-54.[4]

In *United States v. Classon*, 1992 U.S. Dist. LEXIS 12700 (June 4, 1992), adopted 1992 U.S. Dist. LEXIS 11065, (M.D. Fla. July 14, 1992), the IRS summoned Classon for "all documents and records . . . that reflect income [he] received" during years that he did not file returns. After argument, the court ruled:

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4. Because the district court had not made a specific finding as to whether the production or answers would incriminate Argomaniz, the court remanded for such a finding.

> Respondent has properly invoked his Fifth Amendment privilege against self-incrimination in refusing to answer the questions posed to him by the IRS agent and in refusing to commit the testimonial act of producing records and documents responsive to the summons. Respondent's fear of prosecution is legitimate under the standard set forth in ***Argomaniz***. Respondents' answering the questions and producing any responsive records or documents would tend to be incriminating. **By definition, all of the requested records (i.e., documents related to Respondent's income) tend to be incriminating, else they would be non-responsive.**

*Classon*, 1992 U.S. Dist. LEXIS 12700, at *2-3.[5]

Under the facts and circumstances of this case, any question within the investigative purview of the summons seeks incriminating oral testimony. The courts below had enough information at its disposal to require it to affirm Miller's privilege against self-incrimination as to any possible testimony required by the summonses.

C. The general rule against "blanket" claims does not save the judgment.

The general rule against blanket assertions of a claim of privilege is not a different or additional standard to be applied. It is merely a method of determining whether the government

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5. To be clear, the language in the cited cases dealing with production of documents are applicable in this case only to the issue of determining the nature of incriminating requests. Under the collective entity rule, Miller must produce ICKI's documents.

has met its burden under the above rules. The reason for requiring that any claim be asserted and analyzed on a question-by-question basis is because "the court **usually** 'cannot speculate and say that any response to all possible questions would or would not tend to incriminate the witness.'" *United States v. Tsui*, 646 F.2d 365, 367 (9th Cir. 1981). But where, as here, sufficient facts exist to allow a court to make its determination, the no blanket claim rule is not necessary, applicable, or relevant.

The proper rule to apply here is whenever a court can determine that all relevant questions would elicit incriminatory responses a blanket claim may be asserted. In the analogous context of witness testimony, this concept is universally accepted and applied. *See, e.g., Tsui*, 646 F.2d at 367-68 (An exception to the blanket claim rule is when the court "is in a position to 'say that any response to all possible questions would tend to incriminate the witness." "A trial court may sustain a claimed right to refuse to testify if the court, based on its knowledge of the case and of the testimony expected from the witness, can conclude that the witness could 'legitimately refuse to answer essentially all relevant questions."); *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980) (same); *United States v. Klinger*, 128 F.3d 705, 709 (9th Cir. 1997) ("Where a district court finds that the witness could invoke his Fifth Amendment privilege as to all questions, it may recognize a witness' blanket privilege against self-incrimination . . ."); *United States v. Thornton*, 733 F.2d 121, 127 (D.C. Cir. 1984) ("a blanket claim of privilege should be sustained when the witness could legitimately refuse to answer all relevant questions")

Because the Court of Appeals failed to properly apply long

and well settled Fifth Amendment principles of this Court, a writ of certiorai should issue to correct the judgment.

## CONCLUSION

For each and all of the above grounds, a writ of certiorari should issue.

The decisions below should be reversed.

Respectfully submitted,

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November 16, 1999.

APPENDIX A

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. INSURANCE CONSULTANTS OF KNOX, INCORPORATED, and MARVIN D. MILLER, Defendants-Appellants.

No. 98-4173

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

1999 U.S. App. LEXIS 19662
99-2 U.S. Tax Cas. (CCH) ¶ 50,791

August 18, 1999, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 98 Ć 191. Allen Sharp, Judge.

DISPOSITION: Affirmed judgment of the district court and Order the defendants to Show Cause within ten days why $2,000 damages and double costs ought not be awarded to the government.

CORE TERMS: summons, summonses, notice, self-incrimination, incriminate, compelled, custodian, demanded, frivolous, representative capacity, personal privilege, personal interest, oral testimony, protester, double, entity, requested information, purposes of delay, prima facie case, business hours, corporate tax, notice period, unenforceable, foreordained, appearance, prejudiced, harassment, demanding, obstinacy, producing

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Robert L. Baker, Charles E. Brookhart, DEPARTMENT OF JUSTICE, Washington, DC USA.

For INSURANCE CONSULTANTS OF KNOX, INCORPORATED, Defendant - Appellant: Henry R. Hart, Granger, IN.

MARVIN D. MILLER, Defendant - Appellant, Pro se, Knox, IN.

JUDGES: Before POSNER, Chief Judge, and EASTERBROOK and ROVNER, Circuit Judges.

OPINIONBY: ROVNER

OPINION: ROVNER, Circuit Judge. Marvin Miller is a tax protester who has appeared before this court, federal district court, or United States Tax Court in tax matters on seven occasions over the last fifteen years. In the course of an investigation into Miller's tax liabilities for 1991-1996, the Internal Revenue Service ("IRS") issued two summonses directing production of various corporate documents relating to his financial transactions. One summons was issued to Insurance Consultants of Knox, Inc. ("ICKI"), whose principal place of business is in Knox, Indiana, and the other was issued to Miller as Secretary/Treasurer of ICKI. Neither ICKI nor Miller complied with these summonses, lodging various objections instead, and the IRS petitioned for enforcement. The district court granted the petition, and the defendants appeal on the grounds that: (1) enforcement would violate Miller's Fifth Amendment rights against self-incrimination, (2) production of the documents requested cannot be compelled because they are

already in the possession of the IRS, and (3) the summonses gave inadequate notice. We affirm and order the defendants to show cause why sanctions should not be imposed for filing a frivolous appeal.

The first summons was issued on February 11, 1997 and served on ICKI by IRS Special Agent Sylvia Arment by personal in-hand service to Miller as ICKI's representative at 12 noon on that date. It directed ICKI to produce books, account records, papers, and other data relating to Miller's financial situation for 1991-1995. The summons stated that ICKI was to appear with the documents at the IRS office in Merrillville, Indiana, on February 21, 1997 at 11 in the morning. Miller responded with a letter dated February 12, 1997 which demanded proof of Arment's identity and authority and raised several objections to the summons. When the IRS wrote Miller on February 14 identifying the legal basis for the summons, Miller replied in a letter of February 17 that the agency had failed to produce proper authority for the summons and that he would not consider himself bound to comply unless the agency provided satisfactory proof of that authority by February 20, but that the IRS might apply to him for additional time to comply with his requirements. ICKI did not appear on February 21 and has not produced the documents demanded in the summons.

On February 25, the IRS issued a second summons, demanding the same documents and information, this time directed to Miller as Secretary/Treasurer of ICKI, which was served by leaving it at Miller's residence. It directed Miller to appear at the IRS office on March 10, 1997 with the materials described in the summons. Miller once more demanded proof of Arment's authority, raised objections to the summons, and failed to comply in any respect.

The IRS then petitioned for enforcement of the two summonses. In support of its petition, the government filed an affidavit from Arment stating that the information was sought in connection with an inquiry into Miller's tax liabilities for 1991-1995. (The inquiry was later extended to include 1996 as well.) The district court ordered Miller and ICKI to show cause why compliance should not be enforced. It struck the pleadings Miller submitted on ICKI's behalf on the grounds that Miller could not represent ICKI because he was not an attorney. The district court also referred the case to a magistrate judge for an evidentiary hearing, which was held on June 12, 1998, Miller appearing pro se and ICKI being represented by counsel. The magistrate judge recommended that Miller's and ICKI's arguments be rejected and that the petition enforcing the summons be granted. In October 1998, the district court so ordered in a memorandum and order that adopted the magistrate judge's recommendations. This appeal followed.

As we stated the last time we had occasion to consider Miller's refusal to comply with an IRS summons, we review a district court's determination of whether the factual conditions for enforcement of a summons have been met for clear error. *Miller v. United States*, 150 F.3d 770, 771 (7th Cir. 1998). Whether enforcement of the summons would violate Miller's Fifth Amendment privilege against compelled self-incrimination is a mixed question of law and fact. See *United States v. Medlin*, 986 F.2d 463, 466 (11th Cir. 1993). We review the district court's factual findings for clear error and the application of law to those facts de novo. *See id.*

The IRS is authorized to issue summonses to determine the liability of any person for any internal revenue tax, among other purposes. *See* 26 U.S.C. § 7602. A district court may compel

compliance with an IRS summons. *See id.* § 7402(a) & (b). To obtain enforcement of a summons, the government must show that: (1) the investigation is being conducted for a legitimate purpose; (2) the information sought is relevant to the investigation and (3) not already in the government's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed. *See United States v. Powell,* 379 U.S. 48, 57-58, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964). The Powell requirements impose only a "minimal burden" on the agency. *Miller,* 150 F.3d at 772. They can usually be satisfied by an affidavit stating that the government has met them. Id.; *see United States v. Dynavac, Inc.,* 6 F.3d 1407, 1414 (9th Cir. 1993). Once the government meets this prima facie burden, the taxpayer faces a "'heavy burden' to either present facts to disprove one of the Powell factors, or to show that the IRS issued the summons in bad faith." *Miller,* 150 F.3d at 772 (internal citations omitted); *see also United States v. LaSalle National Bank,* 437 U.S. 298, 316, 57 L. Ed. 2d 221, 98 S. Ct. 2357 (1978). The taxpayer can rebut the government's prima facie case only by alleging "specific facts" in rebuttal. *Crystal v. United States,* 172 F.3d 1141, 1144 (9th Cir. 1999); *United States v. Kis,* 658 F.2d 526, 543 (7th Cir. 1981).

Here, Arment's affidavit established the government's prima facie case. The defendants have four arguments in rebuttal. First, Miller argues on his own behalf that enforcement of the summonses would violate his Fifth Amendment rights against compelled self-incrimination because he has a personal privilege not to incriminate himself. Miller acknowledges that ICKI, a corporation, has no Fifth Amendment right to refuse to produce documents in the face of a valid summons. *See Braswell v. United States,* 487 U.S. 99, 105, 101 L. Ed. 2d 98, 108 S. Ct. 2284 (1988) (collective entities lack Fifth

Amendment privilege); *Hale v. Henkel,* 201 U.S. 43, 75, 50 L. Ed. 652, 26 S. Ct. 370 (1906) (corporation is not a "person" for purposes of the privilege against self-incrimination), overruled in part on other grounds by *Murphy v. Waterfront Comm'n of New York Harbor,* 378 U.S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964). Miller concedes that a custodian of corporate records cannot rely on a personal privilege against self-incrimination to avoid producing corporate documents which are in his possession in a representative capacity even if those documents might incriminate him. *See Braswell,* 487 U.S. at 108, 113-14, 118-19; *Bellis v. United States,* 417 U.S. 85, 88, 40 L. Ed. 2d 678, 94 S. Ct. 2179 (1974).

However, Miller asserts that he has a personal privilege against compelled self-incrimination. He further avers that in striking Miller's pleading on behalf of ICKI, the district court did not consider whether Miller himself could assert his own Fifth Amendment privilege. He contends that it does not follow that he himself lacks a personal interest in the privilege merely because he appears in his representative capacity. This proves far too much, however. If Miller could refuse to comply with the summons issued to him as custodian of documents because he has a personal interest in not incriminating himself, Braswell and the entire line of cases that establish the collective entity doctrine, going back 93 years to Hale, would be overruled. Needless to say, that is not feasible. Even if Miller could assert a personal interest, the Fifth Amendment privilege against self-incrimination which exists for private papers would not protect individuals against being forced to produce records required by law, *see Shapiro v. United States,* 335 U.S. 1, 17, 92 L. Ed. 1787, 68 S. Ct. 1375 (1948), like most of those demanded in the summonses here. The district court did not abuse its discretion in striking the pleading. *See Cleveland v. Porca Co.,* 38 F.3d

289, 297 (7th Cir. 1994) (standard of review for district court decision to strike unauthorized pleadings).

Second, Miller and ICKI argue that enforcement of the summonses would violate Miller's Fifth Amendment rights in requiring him to give self-incriminating oral testimony. ICKI cannot assert Miller's privilege against self-incrimination, so we consider only Miller's argument on his own behalf. Miller says that the Supreme Court has drawn a line "between oral testimony and other forms of incrimination." *Braswell,* 487 U.S. at 114. Even when a custodian of corporate documents must produce records which incriminate him, "'he cannot lawfully be compelled . . . [without immunization] to condemn himself by his own oral testimony.'" *Id.* (internal citations omitted). Because the summonses in dispute here direct Miller to "give testimony and produce for examination" various records (emphasis added), Miller claims that the prohibition against compelled oral testimony which might incriminate him means that his personal Fifth Amendment privilege extends to the production of corporate documents of which he is the custodian and which might incriminate him. The non sequitur is manifest. The summonses direct Miller in his representative capacity to produce certain records, which he has failed to do. Should he be asked to give oral testimony which might incriminate him, we would face different questions which are not presented here. n1 See, e.g., *Holifield v. United States,* 909 F.2d 201, 204 (7th Cir. 1990) (privilege must be asserted on a question-by-question, document-by-document basis; "blanket claim" of privilege is "unacceptable"). As custodian of the documents, then, Miller must produce corporate records which are legitimately summonsed even if they incriminate him.

n1 Miller concedes that he may be compelled to orally

identify and authenticate the documents specified in the summonses.

Miller and ICKI's third argument is that the government has failed to satisfy the Powell requirement that the records demanded not already be in possession of the IRS. *See* 379 U.S. 48 at 57-58, 85 S. Ct. 248, 13 L. Ed. 2d 112. The defendants say that ICKI has filed corporate tax returns for all the years in question in which it has reported any required information pertinent to Miller's personal compensation, and so the IRS already has the information it seeks. This is incorrect. The Supreme Court clearly held in Powell that the showing of abuse of process necessary to quash an administrative summons must be "predicated on more than the fact of re-examination." 379 U.S. at 51. Even if the IRS had requested only copies of ICKI's corporate tax returns, they would not be precluded from demanding these again. *See Spell v. United States,* 907 F.2d 36, 38 (4th Cir. 1990) (Taxpayer may not refuse to produce records merely because his returns have been once previously examined.); *United States v. Lang,* 792 F.2d 1235, 1242 (4th Cir. 1986) (permitting a "second look" for a "different and additional purpose"), abrogated on other grounds by *Braswell,* 487 U.S. 99, 101 L. Ed. 2d 98, 108 S. Ct. 2284 (1988); *United States v. Texas Heart Inst.,* 755 F.2d 469, 476-77 (5th Cir. 1985) (rejecting argument that IRS "possesses" information simply because it has previously seen the summoned documents), overruled on other grounds by *United States v. Barrett,* 837 F.2d 1341, 1351 (5th Cir. 1988).

Moreover, the IRS requested a great deal more information which was not necessarily included in the records which defendants allege the IRS already possesses. The government requested all corporate bookkeeping records, inventory records,

records of any and all compensation made to Miller, records reflecting corporate stock ownership, savings and checking account records, and loan records, all in both hard copies and magnetic media. The defendants have therefore failed to carry their burden of showing that Powell has not been satisfied.

The defendants' fourth and final argument is that the first summons was unenforceable because the IRS failed by one hour to give the ten days notice required by 26 U.S.C. § 7605(a) ("The date fixed for the appearance . . . shall be not less than 10 days from the date of the summons."). The summons was served at 12 noon on February 11, 1997 and required an appearance at 11 a.m. on February 21, 1997. The defendants contend that this summons was invalid and the district court lacked subject matter jurisdiction to enforce it. The purpose of the notice period, however, is to allow a defendant to exercise his right to dispute the summons, *see, e.g., Sylvestre v. United States,* 978 F.2d 25, 28 (1st Cir. 1998), or to produce the requested information in compliance. Had the statute explicitly provided for a notice period of 240 hours or ten full days, we might decide otherwise, but the statutory term "days" in the notice period will bear the interpretation "during business hours." Unless the taxpayer can show that he is prejudiced by notice of less than ten full days because the deficit disabled him from disputing the summons or producing the requested information, notice to appear any time during business hours of the tenth day constitutes sufficient notice for purposes of § 7605(a). Because the defendants do not assert that they were so prejudiced and because they do not dispute the validity of the second summons, the hour in dispute with respect to the first summons does not render that summons unenforceable.

Federal Rule of Appellate Procedure 38 provides that "if a

court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." An appeal is frivolous "'when the result is foreordained by the lack of substance to the appellant's arguments,'" *Rumsavich v. Borislow,* 154 F.3d 700, 703 (7th Cir. 1998) (internal citations omitted) or when the appeal "merely restates arguments that the district court properly rejected." *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co.,* 956 F.2d 1399, 1406 (7th Cir. 1992) (internal quotation and citation omitted). We at times have also required some evidence of bad faith before finding that sanctions should be imposed. *Lorentzen v. Anderson Pest Control,* 64 F.3d 327, 331 (7th Cir. 1995). Sanctions certainly are justified if the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay, harassment, or out of sheer obstinacy." *Flexible Mfg. Sys. Pty., Ltd. v. Super Products Corp.,* 86 F.3d 96, 101 (7th Cir. 1996). Our standard sanction in a routine tax protester case is $2,000. *See Cohn v. Commissioner of Internal Revenue,* 101 F.3d 486, 487 (7th Cir. 1996).

This case fits the bill. The result in this case was foreordained because defendants' arguments were wholly without merit. Although serious challenges to deeply entrenched precedent are worthy of consideration, the defendants made no attempt whatsoever to explain why we should reverse almost a century of caselaw on the collective entity rule. The defendants' Powell argument failed on its own terms, and the lack of notice argument--which, weak as it was, was in some ways the least disreputable of the lot--was beside the point because it addressed only one of two summonses both of which had the same effect. Moreover, Miller's pattern of

behavior suggests bad faith, with repeated prosecution of cases for purposes of delay, harassment, or out of sheer obstinacy. He is a career tax protester whom we have already sanctioned. *See Miller v. United States,* 868 F.2d 236, 241 (7th Cir. 1988) (imposing double costs and $1,500 in sanctions). His frequent visits to the federal courts on such frivolous grounds waste our time and deprive litigants with real disputes who raise potentially meritorious arguments of an opportunity to be heard in a timely manner.

We Affirm the judgment of the district court and Order the defendants to Show Cause within ten days why $2,000 damages and double costs ought not be awarded to the government.

APPENDIX B

UNITED STATES OF AMERICA, Plaintiff v. INSURANCE CONSULTANTS OF KNOX, INC., and MARVIN D. MILLER, Defendants

No. 3:98cv0191 AS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

1998 U.S. Dist. LEXIS 17867

October 8, 1998, Decided

PRIOR HISTORY: Adopting Magistrate's Document of September 14, 1998, Reported at: 1998 U.S. Dist. LEXIS 15357.

DISPOSITION: Court adopted the recommendation of Magistrate Judge Pierce that the petition to enforce the Internal Revenue summons GRANTED.

COUNSEL: For UNITED STATES OF AMERICA, plaintiff: Gerald H. Parshall, Jr., U S Department of Justice, Washington, DC.

For INSURANCE CONSULTANTS OF KNOX INC, defendant: Henry R. Hart, Granger, IN.

MARVIN D. MILLER, defendant, Pro se, Knox, IN.

JUDGES: ALLEN SHARP, JUDGE, UNITED STATES DISTRICT COURT.

OPINIONBY: ALLEN SHARP

OPINION: MEMORANDUM AND ORDER

On September 14, 1998, United States Magistrate Judge, Robin D. Pierce, filed a Report and Recommendation. The respondents have filed objections on September 24, 1998. Of immediate concern to this court is whether there has been compliance with *Miller v. United States,* 150 F.3d 770, No. 97-3881 (7th Cir. July 28, 1998). Fortunately in this case, perhaps unlike *Miller v. United States,* United States Magistrate Judge Pierce has given close attention to the precise issues that appear in Miller. There is no question that the Internal Revenue Service is taking seriously the teaching and admonition of the Court of Appeals, and it appears in the carefully constructed Report and Recommendation that they have surely done so. This court has also given very close attention to the filing of Mr. Miller here and is well aware of the authorities cited, particularly those from this court and from this circuit. It appears that the sufficiencies found by the Court of Appeals in its published opinion of July 28, 1998, have been obviated and complied with here. The Internal Revenue Service appears to have done here precisely what it has failed to do in *Miller.* The earlier opinion of this court and particularly the opinion of a very distinguished panel of the Court of Appeals in 868 F.2d 236, do not appear to avail Mr. Miller anything here. To put it slightly differently, those authorities do not undermine the petition to enforce an Internal Revenue Service summons here, and indeed the record appears to justify the enforcement of the same in accord with the careful analysis of Magistrate Judge Pierce.

Therefore, this court adopts the recommendation of Magistrate Judge Pierce that the petition to enforce the Internal

Revenue summons be GRANTED. Such is now ORDERED.

DATED: October 8, 1998

ALLEN SHARP, JUDGE

UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES OF AMERICA, Petitioner v. INSURANCE CONSULTANTS OF KNOX, INC., et al., Respondents.

CAUSE NO. 3:98-cv-191AS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

1998 U.S. Dist. LEXIS 15357
82 A.F.T.R.2d (RIA) 6495

September 14, 1998, Entered

SUBSEQUENT HISTORY: Adopting Order of October 8, 1998, Reported at: 1998 U.S. Dist. LEXIS 17867.

DISPOSITION: Recommended that this Petition to Enforce Internal Revenue Summonses be GRANTED.

CORE TERMS: summon, summonses, appearance, books of account, custodian, corporate officer, secretary, summoned, reflecting, deposit, recommendation, undersigned, recommended, demanded, issuance, invalid, work-papers, disclosing, withdrawal, inventory, debit, memos, evidentiary hearing, federal income tax, federal tax, tax year, memorandum, referral, custody, manual

COUNSEL: For UNITED STATES OF AMERICA: Gerald H Parshall, Jr, U S Department of Justice, Washington, DC.

For INSURANCE CONSULTANTS OF KNOX INC: Henry R

Hart, Granger, IN.

MARVIN D MILLER, Pro se, Knox, IN.

JUDGES: Robin D. Pierce, U.S. Magistrate Judge.

OPINIONBY: Robin D. Pierce

OPINION: REPORT AND RECOMMENDATION

This cause is before the court on a Petition to Enforce Internal Revenue Summonses in accordance with 26 U.S.C. §§ 7402(b) and 7604(a). Pursuant to an Order to Show Cause and a referral by Judge Sharp, the undersigned conducted an evidentiary hearing in this matter on June 12, 1998. For the reasons which follow, it is recommended that the Petition be granted and that the summonses be enforced.

Background

The IRS is investigating the tax liability of respondent Marvin D. Miller for the years 1991 through 1996. On February 11, 1997, Special Agent Sylvia Arment of the IRS issued an IRS summons directing respondent Insurance Consultants of Knox, Inc. ("ICKI") to appear before her on February 21, 1997, and to produce "all corporate records and books of account relative to the financial transactions of MARVIN D. MILLER" for the years 1991 through 1995. According to the summons, such corporate records and books of account were to include, but not be limited to:

> ALL CORPORATE BOOKKEEPING RECORDS and other financial records including General Ledger,

General Journals, all Subsidiary Ledgers and Journals, Gross Receipts and income records, Cash Receipts and Disbursement records and/or Journals, sales and Purchase records and/or Journals, Accounts Receivable and Payable Ledgers and records, Bad Debt records, Cost of Goods Sold records, Loan Receivable and Payable Ledgers, Voucher Register and all sales and expense invoices including all invoices documenting expenses paid by cash (currency) or bank check (cashier or teller checks) and retained copies of any bank checks (cashier or teller checks.)

Inventory records establishing beginning and ending inventories including inventory sheets, work-papers, and valuation records. Records and work-papers reflecting the purchase, basis and depreciable life of assets. Records and work-papers of sales of corporate assets such records disclosing the dates of purchase and sale, cost and sales price, records establishing or adjusting asset basis.

Records of any and all compensation and/or payments made to and/or for the above named individual by check and/or in cash such as wages, dividends, commissions, bonuses including but not limited to any and all cancelled [sic] checks (front and back), Payroll Journals and ledgers, W-2 statements, Form 1099 statements, W-4 statements.

Corporate Minute Book, Stock Register or other records reflecting ownership of corporate stock. All financial statements, bookkeeper's and/or accountant's workpapers [sic] used in the preparation of corporate

records or tax returns. Retained copies of all federal and state income, payroll and excise tax returns.

SAVINGS ACCOUNT RECORDS: Including passbooks or bank statements, records reflecting dates and amounts of deposits, withdrawals, interest, debit and credit memos, deposit slips, records reflecting the identity of checks deposited, withdrawal slips, and records disclosing the disposition of withdrawals, Forms 1099, debit and credit memos. Records of any certificates of deposit, money market certificates, U.S. Treasury Notes or Bills purchased.

CHECKING ACCOUNT RECORDS: Including bank statements, deposit slips, records revealing the identity of checks drawn on the account, checks deposited, and all debit and credit memos, and Forms 1099 issued.

LOAN RECORDS: Including applications, financial statements, loan collateral, credit and background investigations required, loan agreements, notes or mortgages, settlement sheets, contracts, retained copies of checks issued for loans, repayment records, including records revealing the date, amount and method of repayment (cash or check), checks used to repay loans and a record disclosing the total amount of discount or interest paid annually, records of any liens, loans correspondence files and internal memoranda relative to these loans.

RECORD FORMAT: In addition to hard copies, records are requested in the form of magnetic media. Data may be provided in 3 1/2 inch diskette, 8mm tape,

> or 9 track tape, in ASCII delimited format. A record layout for the data is also requested.

See Petition, Ex. 1.

In a letter to Special Agent Arment dated February 12, 1997, Mr. Miller acknowledged receipt of the summons, raised various objections to the summons, and demanded proof of Arment's identity and authority before he would comply. (Petition, Ex.3.) In a letter dated February 14, 1997, Sam Miele of the IRS advised Mr. Miller of the statutory and regulatory authority under which the summons was issued. The letter further stated:

> We expect a corporate officer or the custodian of the records of Insurance Consultants of Knox, Inc. to fully comply with the summons issued by Special Agent Arment and to submit original records as required on February 21, 1997. In the event that a corporate officer or the custodian of the records of Insurance Consultant[s] Knox, Inc. fails to provide the records we will seek summons enforcement.

(Petition, Ex. 4.) To this, Mr. Miller responded with a letter dated February 17, 1997, asserting that Mr. Miele had failed to demonstrate proper authority for the issuance of the summons and stating that if he was not in receipt of sufficient documentation demonstrating such authority by February 20, he would not consider himself under any obligation to comply with the summons on February 21. Mr. Miller added, however, that the IRS could apply to him for additional time in which to comply with his requirements. (Petition, Ex. 5.) ICKI failed to appear as directed on February 21, 1997, and it has failed to

produce the records, books and other information in compliance with the summons.

On February 25, 1997, Special Agent Arment issued a second IRS summons. This time, the summons was directed to "MARVIN D. MILLER as Secretary/Treasurer of Insurance Consultants of Knox, Inc., and/or as an officer of Insurance Consultants of Knox, Inc., and/or as custodian of the records of Insurance Consultants of Knox, Inc., and/or as resident agent of Insurance Consultants of Knox, Inc." The second summons directed Mr. Miller to appear before Special Agent Arment on March 10, 1997, and to produce the same corporate records and books of account as described in the first summons. To this, Mr. Miller responded with a letter to Special Agent Arment dated February 28, 1997. As he had done previously, Mr. Miller raised objections, claimed that the summons was defective, and demanded that Special Agent Arment produce documentation confirming her identity and authority before he would comply. Mr. Miller failed to appear as directed on March 10, 1997, and he has failed to produce the records, books and other documents called for by the summons.

As a result of ICKI's and Mr. Miller's non-compliance, the IRS filed the present Petition to Enforce Internal Revenue Summonses on April 17, 1998. The government submits that the production of the requested books and records is necessary to determine the correct federal tax liabilities of Mr. Miller for the years 1991 through 1995, and to ascertain whether he had a duty to file federal income tax returns for those years, and to determine whether he violated any Internal Revenue laws for those years. In addition, the government asserts that there has been no Justice Department referral within the meaning of 26 U.S.C. § 7602(c), with respect to Mr. Miller for the years under

investigation, and that the testimony and other data sought by the summonses is not already in the possession of the IRS. The government seeks an order directing the respondents to appear before Special Agent Arment, or another IRS officer, and to produce the books, records, documents and other data called for by the summonses.

On April 20, 1998, Judge Sharp granted the government's motion for an order to show cause, and ordered respondents to appear on June 12, 1998, and show cause why they should not be compelled to obey the summonses which had been served on February 11, 1997, and February 25, 1997. On April 23, 1998, Judge Sharp referred the case to the undersigned to "conduct such proceedings, including evidentiary hearings, as are required" and to make proposed findings of fact and recommendations for the disposition of all dispositive motions pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1. Mr. Miller, "in his capacity as a corporate officer of Insurance Consultants of Knox, Inc.," subsequently filed a response to the government's Petition on May 11, 1998, together with a "Memorandum of Points and Authorities in Support of Response to Petition." The court later determined that because Mr. Miller was not an attorney he could not represent the interests of a corporation such as ICKI and, on the government's motion, ordered that the response and memorandum he had submitted on behalf of ICKI be stricken. An evidentiary hearing was conducted before the undersigned on June 12, 1998. At that time, Mr. Miller appeared in person and Attorney Henry Hart appeared on behalf of ICKI. Counsel for the government failed to appear.

Discussion

The IRS has been granted broad power to issue summonses for the purpose of investigating either civil or criminal tax-related liability. 26 U.S.C. § 7602(b). *See Miller v. United States,* 150 F.3d 770, slip op. at 3 (7th Cir. 1998). Whenever a person summoned neglects or refuses to obey a summons, the IRS is empowered to apply to the court for enforcement. 26 U.S.C. § 7604. To obtain enforcement of an IRS summons, the government need only make a minimal showing that (1) the investigation has a legitimate purpose; (2) the information sought may be relevant to that purpose; (3) the information is not already in the possession of the IRS; and (4) that the IRS has followed the procedural steps outlined in 26 U.S.C. § 7603. *United States v. Powell,* 379 U.S. 48, 57-58, 85 S. Ct. 248, 254-55, 13 L. Ed. 2d 112 (1964); *see United States v. Stuart,* 489 U.S. 353, 359, 109 S. Ct. 1183, 1187-88, 103 L. Ed. 2d 388 (1989). "The government typically makes that showing through the affidavit of the revenue agent conducting the audit." *2121 Arlington Heights Corp. v. I.R.S.,* 109 F.3d 1221, 1224 (7th Cir. 1997); *see United States v. Berg,* 20 F.3d 304, 308 (7th Cir. 1994); *United v. Kis,* 658 F.2d 526, 543 (7th Cir. 1981), *cert. denied,* 455 U.S. 1018, 102 S. Ct. 1712, 72 L. Ed. 2d 135 (1982). Once the government has presented a prima facie case, the taxpayer faces "'an extraordinarily heavy burden,'" which amounts to a showing that enforcement of the summons would constitute an abuse of process. *Miller,* slip op. at 4 (quoting *Kis,* 658 F.2d at 535); *2121 Arlington Heights Corp.,* 109 F.3d at 1224. The taxpayer must disprove the existence of one of the Powell factors or point to specific facts showing that the IRS issued the summons in bad faith. *Id.*

In the present case, the of Special Agent Arment (Petition, Ex. 2) satisfies the government's prima facie burden. The investigation has several legitimate purposes -- the

determination of Mr. Miller's federal tax liability for the years 1991 through 1995, along with the determination of whether he had a duty to file federal income tax returns for those years and whether he violated any Internal Revenue laws for those years. The information sought -- corporate records and books of account relative to Mr. Miller's financial transactions for the years in question -- is clearly relevant to the investigation. The information, according to the, is not already in the possession of the IRS. And, Special Agent Arment represents that "all procedures required by the Internal Revenue Code, as amended, were followed with respect to these summonses." (Petition, Ex. 2 at 4.) The burden, therefore, falls upon respondents to show why the summonses should not be enforced.

Respondents contend that the first summons, which was dated February 11, 1997, is unenforceable or invalid because the date fixed for the summoned party's appearance was less than ten days from the date of issuance. Respondents are mistaken. Respondents rely upon 26 U.S.C. § 7605(b)(2) which provides that "the date fixed for appearance before an officer or employee of the Service must be no less than 10 days from the date of the summons." The summons to ICKI was issued, dated and served on February 11, 1997. It directed a corporate officer or custodian of ICKI's records to appear on February 21, 1997, ten days after the date of the summons. The summons, therefore, did not violate § 7605(b)(2), which prohibits an appearance date "less than 10 days from the date of the summons." (emphasis supplied) Respondents also point to a provision in the Internal Revenue manual which states that "the time and place specified for the appearance should be reasonable under the circumstances and should not be less than 11 full calendar days from the date the summons is served."

IRM § 4022.65(1). It is well established, however, that compliance with the Internal Revenue manual, which sets forth IRS policies and procedures, is not mandatory. *Urban v. C.I.R.*, 964 F.2d 888, 890 (9th Cir. 1992); *Luhring v. Glotzbach*, 304 F.2d 560 (4th Cir. 1962); *First Federal Savings and Loan Association of Pittsburgh v. Goldman*, 644 F. Supp. 101, 102 (W.D. Pa. 1986) (the "procedures of the IRM are not binding upon the IRS and convey no rights to taxpayers").

Respondents further contend that the IRS waived enforcement of the first summons to ICKI by issuing the second summons, which was directed to Mr. Miller in various capacities as a representative of ICKI. Although both summonses seek to obtain the same information from ICKI concerning Mr. Miller's financial transactions, there is no indication that the IRS intended to supplant the first summons with the second, or to otherwise waive enforcement of the first summons. Moreover, respondents have cited no authority for the proposition that the issuance of a second summons under these circumstances operates as a waiver of the right to enforce the first summons, and the court can find none. Respondents' waiver argument is without merit.

Respondents also maintain that the summons issued on February 25, 1997, (the second summons) was invalid or ineffective because it was served upon Mr. Miller at his home address, rather than at ICKI's corporate address as reflected in plaintiffs Exhibits A and B. This argument is also unavailing. Section 7602(a)(2) empowers the IRS to summon "any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . or any other person the secretary may deem proper . . . ." Section 7603(a) further provides that "[a] summons

issued under section . . . 7602 shall be served by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode." As Mr. Miller was ICKI's secretary and the person having custody of ICKI's records, he was properly served with the summons at his "place of abode." *See U.S. v. Raniere,* 895 F. Supp. 699, 704 (D. N.J. 1995); *United States v. Intergold Corp.,* 1976 U.S. Dist. LEXIS 12026, 1976 WL 910, *2 (N.D.N.Y. Dec. 2, 1976).

Respondents further argue that the second summons is defective because the appearance date shown on the summons is unclear and confusing. The court cannot agree. The summons directed Mr. Miller to appear on "the 10th day of March, 1997 at 11 o'clock a.m." Although the handwritten appearance date was evidently changed or corrected to indicate the "10th," there can be no question that the summons directed Mr. Miller to appear at 11:00 a.m. on March 10, 1997. It is worth noting that although Mr. Miller, in his letter of February 28, 1997, (Petition, Ex. 7), raised a number of objections to the form of the summons, such as the absence of a court name or seal and the lack of reference to any statute or regulation, he made no mention of any problem reading the appearance date.

Respondents also challenge the summonses as over broad. An IRS summons is considered over broad "if it does not advise the summoned party what is required of him or her with sufficient specificity to permit him to respond adequately to the summons." *United States v. Wyatt,* 637 F.2d 293, 302 n. 16 (5th Cir. 1981); *Niemeyer v. United States,* 1996 U.S. Dist. LEXIS 17086, 1996 WL 756527, *5 (C.D. Ill. Oct. 31, 1996); *United States v. Moseley,* 832 F. Supp. 56, 60 (W.D.N.Y. 1993). Here, both summonses clearly indicated that the IRS was seeking corporate records and books of account relative to Mr. Miller's

financial transactions for the years 1991 through 1995, and they went into considerable detail in describing the types of records which were being sought. The summonses specified the subject matter of the documents requested, the source of the documents and the time period from which the documents were to be drawn. The description adequately advised Mr. Miller and ICKI what was required. Accordingly, the summonses were not over broad. See *Barquero v. U.S.,* 18 F.3d 1311, 1318 (5th Cir. 1994); *U.S. v. Medlin,* 986 F.2d 463, 467 (11th Cir. 1993); *Springer v. Internal Revenue Service,* 1997 U.S. Dist. LEXIS 15021, 1997 WL 732526, *6 (E.D.Cal. Sept. 12, 1997).

Respondents next assert that the summonses are invalid because a corporation cannot be compelled to testify. This argument is frivolous. The first summons was directed to a "corporate officer or custodian of records" of ICKI, and the second summons was directed to Mr. Miller "as Secretary/Treasurer . . . and/or as an officer . . . and/or as custodian of the records . . . and/or as resident agent" of ICKI. Both summonses made it clear that a corporate representative was expected to appear and give testimony, and § 7602(a)(2) expressly provides that such a person may be summoned "to give such testimony, under oath, as may be relevant or material to such inquiry . . . ." *See Raniere,* 895 F. Supp. at 707.

Lastly, Mr. Miller argues that the information sought by the summonses is already in the possession of the IRS, as evidenced by the fact that the Petition asserts that "Mr. Miller received commissions from ICKI of more than $60,000 in 1993." (Petition at 3, ¶8.) This conclusory assertion, however, fails to satisfy respondents' burden and fails to overcome Special Agent Arment's Declaration in which she stated that "the data demanded by the summonses . . . are not already in the

possession of the Internal Revenue Service." (Arment Declaration at 3, ¶15.) *See Niemeyer,* at *8; *Streett v. U.S.,* 1996 U.S. Dist. LEXIS 11624, 1996 WL 571632, *4 (W.D. Va. July 29, 1996) (mere fact that IRS was able to calculate taxpayer's tax liability for 1993 tax year did not, by itself, demonstrate that IRS had the information relating to the 1993 tax year in its possession).

For the foregoing reasons, it is RECOMMENDED that the Petition to Enforce Internal Revenue Summonses be GRANTED, and that an Order be entered consistent with the relief requested in the Petition.

NOTICE IS HEREBY GIVEN that within ten (10) days after being served with a copy of this recommended disposition a party may serve and file specific, written objections to the proposed findings and/or recommendations. Fed.R.Civ.P. 72(b). FAILURE TO FILE OBJECTIONS WITHIN THE SPECIFIED TIME WAIVES THE RIGHT TO APPEAL THE DISTRICT COURT'S ORDER. *See Thomas v. Arn,* 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Lerro v. Quaker Oats Co.,* 84 F.3d 239 (7th Cir. 1996); *Lockert v. Faulkner,* 843 F.2d 1015 (7th Cir. 1988); *Video Views, Inc. v. Studio 21 Ltd.,* 797 F.2d 538 (7th Cir. 1986).

Dated this 14th day of September, 1998.

Robin D. Pierce, U.S. Magistrate Judge